

## REMARKS/ARGUMENTS

The rejections presented in the Office Action dated December 26, 2008 (hereinafter Office Action) have been considered. Claims 1-62 remain pending in the application. Reconsideration of the pending claims and allowance of the application in view of the present response is respectfully requested.

The Applicant thanks the Examiner for participating in a telephonic interview on February 9, 2009. During this interview, the §112, second paragraph and §102(e) rejections were discussed.

Claims 36-60 are rejected based on 35 U.S.C. §112, second paragraph, as being indefinite. The §112, second paragraph rejection of claims 36-60 is based on lack of positive recitation of memory in independent claim 36, among other things. The Applicant has amended claims 36 and 49-54 in the manner recommended in the Office Action and as discussed during the telephone interview. These amendments do not add new matter. Further, these amendments merely state expressly features that are inherent in the original claims, and do not narrow the scope of these claims. Accordingly, the Applicant respectfully requests reconsideration and withdrawal of the §112, second paragraph rejection of claims 36-60.

Claims 1-3, 9-20, 24-27, 31-39, 44-55, and 59-62 are rejected based on 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 7,031,773 to Levine et al. (hereinafter "Levine").

The Applicant's independent claims 1, 20, 36, 61, and 62 each recite, among other features, some variation of disabling atrial antitachycardia pacing (ATP) therapy in response to a measured impedance deviating from a threshold.

In addressing these claims, the Office Action cites Col. 11, Lines 5-19 (Page 4), which states:

if the measured impedance falls outside of a predetermined or programmable impedance range, as for example less than 200 ohms or greater than 2000 ohms or a variance from the previous measurement by 500 ohms or a percentage of the baseline measurements, indicating a lead failure, the impedance measuring circuit 112, through the microcontroller

60, will cause the switch 74 to switch the pacing electrode configuration to an electrode configuration other than the current pacing electrode configuration as for example, a unipolar pacing electrode configuration. The microcontroller 60 will then cause to autocapture 75 to conduct an autocapture test with the unipolar pacing electrode configuration or sets the pacing output to a level which assures capture. (Col. 11, Lines 11-23).

As discussed in the telephone interview, Levine discloses continuing capture detection with a different electrode combination using a switch 74 in response impedance deviation. The Applicant's independent claims recite disabling ATP therapy. The Applicant respectfully submits that Levine's switching which electrodes an autocapture program is administered through during the autocapture test does not constitute disabling an ATP therapy.

Moreover, the Applicant notes that Levine concerns switching electrodes during an autocapture test, and does not provide the same for an ATP therapy. The Applicant respectfully submits that the statement in the "Response to Arguments" section of the Office Action that "Levine discloses that it provides ATP therapy, check for lead status, and then disables the therapy using the current lead setup if the impedance is outside of a programmable range" is without support in Levine. (Pages 9-10).

For at least these reasons, the rejection fails to account for all elements of the independent claims.

The Applicant's independent Claims 1, 36, and 61 each further recite, among other features, some variation of an impedance threshold developed for a particular patient.

Levine discloses "a predetermined or programmable impedance range" that when exceeded indicates a lead failure. (Col. 11, Lines 11-15). Such a predetermined or programmable range could be, for example, a factory setting. Levine does not disclose that the impedance range is developed for a particular patient. The Applicant notes that the Office Action cites Col. 8, Line 65 - Col. 9, Line 7 in addressing this claimed subject matter. However, the customizable parameters specified in this portion of Levine include parameters for detecting arrhythmia and delivery of a therapy (i.e. pulse amplitude, duration, rate, etc.) but do not include an impedance threshold developed for a particular

patient. For at least these reasons, the rejection fails to account for all elements of the independent claims 1, 36, and 61.

Applicant's independent Claims 20 and 62 each recite, among other features, some variation of measuring impedance, a capture threshold, and a sense amplitude, respectively associated with an atrial lead and comparing the impedance, capture threshold, and sense amplitude measurements with impedance, capture threshold, and sense amplitude limits, respectively. To account for this subject matter, page 4 of the Office Action cites Col. 10, Lines 35-55. Col. 10, Lines 35-55 discloses how autocapture features scan for a capture threshold by delivering successive pacing pulses with decrements in energy level while sensing for evoked responses.

As discussed above, Levine discloses an autocapture technique which enables an impedance measuring circuit "whenever there is a failure to detect an evoked response (presumed loss of capture)." (Col. 11, Lines 1-3). Levine's impedance measuring circuit then takes an impedance measurement and compares the measurement to a predetermined range. (Col. 11, Lines 4-15). Levine does not teach at least comparing a capture threshold with a capture threshold limit.

In addressing Applicant's position in this regard, the Office Action has relied on the idea that comparing a capture threshold with a capture threshold limit is inherent in Levine (Final Office Action mailed 5/25/2007, Page 4). The current Office Action cites two patent references on page 10 and states that such subject matter is well known in the art. The Applicant notes that the rejection of the independent claims is rejected under §102(c), which is not an obviousness-type rejection. Furthermore, the fact that a certain result or characteristic may occur or be present in the prior art (e.g., in another reference) is not sufficient to establish the inherency of that result or characteristic in the Levine reference. To establish inherency, the missing descriptive matter must be necessarily present in the thing described in the reference. Inherency, however, may not be established by mere probabilities or possibilities. The Applicant respectfully requests evidence that such subject matter is well known sufficient to satisfy §103(a). M.P.E.P. §2112(IV).

For each of the reasons provided above, the Applicant respectfully submits that the rejection does not account for all elements of independent claims 1, 20, 36, 61, and 62, and therefore must be withdrawn. Also, the rejection of dependent claims 2, 3, 10-19, 24-27, 37-39, 44-55, 59, and 60 must be withdrawn as these claims respectively depend from independent claims 1, 20, 36, 61, and 62.

Claims 4-8, 21-23, 28-30, 40-43, and 56-58 are rejected based on 35 U.S.C. §103(a) as being unpatentable over Levine.

Each of claims 4-8, 21-23, 28-29, 40-43, and 56-58 depend from one of independent claims 1, 20, and 36. For each of the reasons discussed above, the Applicant respectfully submits that independent claims 1, 20, and 36 are patentable over Levine, and that the associated dependent claims 4-8, 21-23, 28-29, 40-43, and 56-58 are likewise patentable over Levine.

Moreover, in addressing these dependent claims, the rejection acknowledges that many of the claimed limitations are not disclosed by Levine. (E.g., see part 10 on page 7 of the Office Action). As such, the Office Action states “however, it is well known in the art to characterize an impedance threshold as set forth in the claim limitations stated herein because they indicate relative displacement of the implanted cardiac lead giving the physician viable information to initiate definitive therapy at the appropriate time.” (*Id.*). The Applicant respectfully requests evidence that such subject matter is well known sufficient to satisfy §103(a). M.P.E.P. §2112(IV).

For each of the reasons provided above, the Applicant respectfully submits that the rejection of claims 4-8, 21-23, 28-29, 40-43, and 56-58 is in error and must be withdrawn.

To the extent the Applicant has not responded to any characterization by the Examiner of the asserted art or of the Applicant’s claimed subject matter, or to any application by the Examiner of the asserted art to any claimed subject matter, the Applicant wishes to make clear for the record that any such lack of response should not be interpreted as an acquiescence to such characterizations or applications. A detailed discussion of each of the Examiner’s characterizations, or any other assertions or statements beyond that

provided above is unnecessary in view of the present response. The Applicant reserves the right to address in detail any such assertions or statements in future prosecution.

The Applicant respectfully submits that the application is in condition for allowance, timely notification of which is kindly solicited. Authorization is given to charge Deposit Account No. 50-3581 (GUID.014US01) any necessary fees for this filing. If the Examiner believes it necessary or helpful, the Examiner is invited to contact the undersigned attorney to discuss any issues related to this case.

Respectfully submitted,

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